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SUBJECT Testimony of Honorable Frank C. Carlucci on H.R. 3822 Thursday, 16 June 1988

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**TESTIMONY OF THE HONORABLE FRANK C. CARLUCCI**
SECRETARY OF DEFENSE
BEFORE THE HOUSE COMMITTEE ON FOREIGN AFFAIRS
ON H.R. 3822
THURSDAY, 16 JUNE 1988

Mr. Chairman, I thank you and the Committee for the opportunity to exchange views with you on the proposed Intelligence Oversight Act of 1988. The subject matter of H.R. 3822, the degree of Presidential interest, and my prior position as National Security Advisor during the period when important NSC reforms which bear directly on these hearings were made brings me here on behalf of the Administration.

Today, I would like to offer the Committee my thoughts on the proposed legislation, bearing in mind the circumstances which prompted the Congress to consider new legislation, and to ask whether this bill would improve the situation. I strongly believe that this legislative proposal is the unhappy result of a breakdown in consultation between the Executive and Legislative branches. It serves no purpose to cast blame. An attitude of mistrust on both sides complicated the kind of confidence in one another which our Presidents and our legislators need in order to carry out their respective Constitutional duties effectively and successfully.

The Congressional Iran-Contra report was right when it said, "Democratic government is not possible without trust between the branches of government and between the government and the people." (p. 20) Those relationships suffered a setback in the Iran-Contra affair, as actions were concealed from Congress and, in one key

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instance, from the President himself. An unhealthy lack of shared purpose between the Congress and the Executive -- to be blunt, an adversarial relationship -- kept key actors on each side from sharing confidences and building a lasting consensus which would apply to all of the tools of statecraft which support national foreign policy objectives.

I can think of no step by the Congress which would do more harm to the process of rebuilding an atmosphere of trust and candor between the branches than unilaterally to lay claim to prerogatives which the President firmly believes are vested in the Executive by the Constitution. The distinguished Members of this Committee are particularly well-versed in the nature of exigencies abroad affecting U.S. interests and the inherent limits on our ability to act effectively beyond our borders. The founders of this country similarly recognized that compelling circumstances could require the Executive to act on behalf of the American people. Who among us can say with absolute certainty that no future President will ever be faced with a situation requiring that notification of a covert action to the Congress be delayed beyond 48 hours?

One recent example, which the House and Senate intelligence committees have both discussed in their hearings on the proposed Intelligence Oversight Act of 1987, is the assistance which Canada rendered to the United States in 1980 in helping to smuggle six American hostages out of Iran. As one Member of Congress who served on the House Permanent Select Committee on Intelligence

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at the time has testified, Canada had one request in offering its cooperation: that the President not tell the Congress. Was this unreasonable? You and I might say "yes," believing that the Congress could be trusted to protect this information. But from Canada's perspective, clearly it feared having its own Embassy in Teheran laid siege, as our own had been, if its assistance became known. President Carter authorized a covert action to get those six Americans safely out of Iran. He did not tell the Congress until after the fact. Some members disagreed but others argued that President Carter had done the right thing.

This example helps us to separate politics from process, and to understand how the founding fathers did the same thing when they designed our Constitutional separation of powers. Virtually all Americans would regard the rescue of six citizens in that situation as a goal justifying covert action, and they would view the Government of Canada as a worthy partner in that endeavor. Canada's demands for extreme secrecy would also appear reasonable, when we recall the climate of danger in Teheran at the time.

Yet the cold fact remains that if H.R. 3822 had been the law of the land in 1980, President Carter would have had to say "thanks but no thanks" to Canada. What would have happened to those six Americans, who were separated from the fifty-two Americans held in the American Embassy in Teheran, no one can say.

So there is more to the 48-hour notification issue than abstract theory. President Reagan s policy, as laid down in NSDD 286, is

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to do precisely what H.R. 3822 would compel him to do -- to notify the intelligence committees of covert action findings no later than 48 hours after they are signed. If this policy cannot be followed for exigent reasons, the NSPG is required to review the situation every ten days. We believe the NSDD works well with the current statutory framework governing intelligence activities. President Reagan also strongly believes that no President can accept a statute that purports to impose limitations on a power which the Constitution vests in the Executive and which has rested with the Executive since the founding of our nation.

I respectfully urge the members to reflect on the wisdom of the President's position and, beyond this, to consider the effect of provoking a Presidential veto on legislation governing the entire realm of intelligence activities. Will this really improve the situation, or will it simply add to the atmosphere of mistrust in a well-meaning effort to be certain that never again will an admitted mistake be repeated? If trust, candor and accountability are the remedy to the problems which brought about the Iran-Contra affair -- as I believe they are -- the Congress risks undermining all of those goals, and reintroducing instead an unhealthy adversarial basis to the oversight process for years to come, if it incorporates a fundamental Constitutional disagreement into the law.

I have dwelt on this one central issue because I hope to persuade the members that the position taken by President Reagan and his immediate predecessors is reasonable and correct.

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Appropriate action was taken as soon as the President became aware of the true nature of what had transpired in the Iran-Contra affair. A new National Security Advisor was brought in. Judge Webster was nominated as Director of Central Intelligence. President Reagan prohibited the National Security Council staff from participating in covert action, and he upgraded the position and authority of the NSC Legal Advisor.

The President directed that findings be set in writing prior to initiation of the covert action. He ordered a full review of ongoing covert actions, and revised or terminated any which were not seen to be necessary or effective. Under a "sunset" clause, Presidential authority for a covert action now expires after one year unless he revalidates it. These and other measures have been praised by the sponsors of the companion Senate legislation. This is not surprising since we consulted with the Senators as we developed our guidelines.

This is the framework currently in place for the management of covert action within the Executive Branch. Does it have the permanence of a statute? No -- admittedly not. The next President will be entitled to set up his own system of managing covert action, consistent with existing law, as will the President after him. However, if government is to function effectively as well as responsively, there must be a line where the statutory framework ends and the President's internal management responsibility begins. No two Presidents are alike in their management styles. No two Administrations have used identical procedures

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and mechanisms for recommending options to the President or implementing Presidential decisions. We must allow our Presidents to manage, and each President must be allowed to manage his Administration in the manner which suits him best.

Let us remember that the failures of the Iran affair were human and managerial. No statute can prevent these mistakes. The Congress' Iran-Contra investigation led to the conclusion that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." (p. 423) With specific reference to the existing "laws and procedures to control secret intelligence activities, including covert actions," the congressional report concluded that, "Experience has shown that these laws and procedures, if respected, are adequate to the task. In the Iran-Contra Affair, however, they often were disregarded." (p. 375)

I do not believe statutory change is necessary. New statutes offer no protection from those would disregard them. Nor would the public good necessarily be served by a framework so restrictive that the talents and initiative of law-abiding public servants were stifled. How much better it would be to have a procedural and statutory framework that heals the wounds, provides for reasonable safeguards, encourages an atmosphere of trust and candid consultation between the branches, and brings the best out of our intelligence professionals and public servants.

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Mr. Chairman, permit me to offer the Committee my vision of such a framework. It begins with the observation, developed over several years working with intelligence matters, that statutes and Executive orders, no matter how well-crafted, can never anticipate every future situation -- nor should they attempt to do so. Inevitably, the intelligence community faces unforeseen circumstances, challenges and requirements, and must come to terms with them as best it can within the existing framework.

Over time, mutually accepted understandings and practices develop in the community and between the branches which become part and parcel of the regulatory framework. Indeed, this is what has happened since the enactment of Hughes-Ryan Amendment. I note that the Senate Select Committee on Intelligence has recognized this fact. Its committee report on S. 1721 states that the definition of the term "special activity," as used in the bill, "is intended, as written, to reflect and incorporate existing law and mutually-agreed upon practice." (p. 38)

Judge Webster recently testified before the House Intelligence Subcommittee on Legislation that a deviation from the existing practice regarding what constitutes a special activity could result in Executive branch agencies having to obtain findings for categories of activities that do not require findings today. I support Judge Webster's position that the Congress should not change the existing practice within the Executive branch on which activities are governed by a Presidential finding.

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As Secretary of Defense, I have a particular concern in this regard that tactical military activities continue to be understood as distinct from covert intelligence actions. This is not a question of what the Congress should be told, but rather a question of which activities should require a Presidential finding. For example, should a finding be required every time we attempt to deceive the Soviet Union on the movement of nuclear weapons or the capabilities of our own military forces? Clearly not, according to the current definition.

I hope that the members will recognize the importance of preserving the body of mutually-agreed upon practice between the branches, even as we look for new ways to prevent the mistakes of the recent past from recurring. I emphasize this because I believe it is important that the House affirm that it is building on the existing foundation of understandings, as the Senate has done. Surely we wish to avoid the paralysis which would plague Executive departments and agencies if they were suddenly unsure whether to seek Findings and report to the intelligence committees on categories of activity which previously have not been viewed by either branch as requiring such treatment.

The present system of congressional committees, in some measure, parallels the Executive branch division of labor, and I am confident that neither this Committee nor any other intends for H.R. 3822 to change that. In this regard, I was gratified by the verbal assurance I received from Chairman McHugh, when I testified before the House Intelligence Subcommittee on Legislation in

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March, that activities traditionally regarded as military activities are not intended to be subject to the covert action procedures delineated in H.R. 3822.

In sum, Mr. Chairman, I come before this Committee as an advocate for learning the lessons of the Iran-Contra matter and restoring integrity, accountability -- and yes, vitality -- to our intelligence activities, which are a small but critically important instrument of our national power. However, I urge the Committee to step back from the immediate context, as did the founding fathers, and consider the value and necessity of an Executive which can act for the nation in extremis. Ask yourself whether the most honorable and talented of our young will join our intelligence services if the bureaucracy is mired in an atmosphere of uncertainty and recrimination. Think about how governments and individuals in other countries will regard the risks of cooperating with the United States if the Executive and the Congress are perpetually at loggerheads on these sensitive matters.

We will not put the mistrust which caused the Iran-Contra affair behind us until we trust each other again. We have laws and regulations in place today which are quite satisfactory. The enormous repercussions of the Iran-Contra matter have made a lasting impression on officials throughout the intelligence community that will serve to prevent a recurrence. I urge the Committee to consider the very real adverse consequences of attempting to impose a new and inflexible statutory framework on

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our Presidents and our intelligence community. Let us instead test each other's good faith and professionalism, and give responsible officials in both branches a chance to earn each other's respect by giving real meaning to the concept of consultation.

Not only does such an approach have the advantage of bringing the best out of our public servants: it is the way the founding fathers intended the system to work.

Thank you, Mr. Chairman.

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